

***HOW TO PROCESS AN APPEAL
IN THE NEW MEXICO COURT OF APPEALS***

A Project of the

***New Mexico Court of Appeals and
Appellate Courts Pro Se Committee***

October 2005

INTRODUCTION

This pamphlet was prepared by the Appellate Courts Pro Se Committee. The Committee is composed of practicing attorneys, librarians, and some of the judges and staff of the New Mexico Court of Appeals and the Supreme Court. The pamphlet is designed to help people to process an appeal in the New Mexico Court of Appeals. It is designed to be used both by attorneys and by people who wish to represent themselves. In addition, the Court of Appeals has forms for most documents that are prepared **especially** for people who wish to represent themselves. However, such people are not required to use those forms; they may use the pamphlet and file documents like the examples in this pamphlet instead. We caution that processing an appeal is a very technical matter. **It is therefore always better to have an attorney who knows about appeals or who has the time to learn about appellate procedures to process the appeal.**

This pamphlet contains:

- I. Some Basic Rules;
- II. A Description of the Various Steps;
- III. A Checklist and Some Practical Pointers; and
- IV. An Actual Case File of a Well-Prepared Case that Was Decided on the Summary Calendar and a General Calendar Case (Post-Assignment to the General Calendar) that You Can Use as Examples.

The documents in this manual may be copied. The pro se forms may be obtained by contacting the Court of Appeals Clerk's Office. Addresses and phone numbers are on .pdf page 19.

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I.

SOME BASIC RULES

Here are some basic rules to follow in preparing whatever document you need to file in the Court of Appeals:

1. Always read the rule about the document before you prepare it, and make sure your document conforms to the rule. The Rules of Appellate Procedure are found in Rule Set 12 in Volume 2 of the New Mexico Rules Annotated (NMRA). The last three volumes of the red books called the New Mexico Statutes Annotated are paperback volumes that include the NMRA, and they are available in the law library. You may buy these rules from the New Mexico Compilation Commission: (505) 827-4821.

2. Be sure that your document is within the page limitation set forth in the rule, and a good practice to follow is: the shorter, the better.

3. For documents that require citations (like briefs), for every statement of fact that you make, you should cite a page or pages of the record proper, transcript, or exhibits; for every statement of law that you make, you should cite one or more cases, statutes, rules, regulations, or constitutional provisions. The citations to facts should appear in parentheses or brackets after your statements. For example: "The judge denied Defendant's motion to suppress. [R.P. 35]" The citations to law need not be in parentheses or brackets. For example: "An appellate court does not reweigh the testimony. Sanchez v. Homestake Mining Co., 102 N.M. 473, 476, 697 P.2d 156, 159 (Ct. App. 1985)."

4. File things early. If you plan to file things early, then you will usually end up filing things on time, even if an emergency comes up.

5. Put the case number on all documents that you file, and all documents must be typed unless you get the Court's prior, written permission not to type.

6. Do not expect to win on appeal if you are the person taking the appeal. Only a small percentage of cases get reversed. The purpose of an appellate court is not to retry the case for a better result. The purpose of an appellate court is to insure that people who have had cases in the trial courts have been treated fairly. If you have been treated fairly, but lost, the appellate court is not going to do anything about that, even if the appellate court thinks

that you have the better case. The appellate court does not reweigh the evidence or decide which side has presented a more credible case. For example, if the prosecution in a criminal case presents one witness and the defense presents 100 witnesses, and the judge or jury believes the prosecution's one witness, the appellate court will not reverse that determination on the ground that the judge or the jury should have believed the 100 witnesses. The appellate court will only reverse if an error of law has been made. Further, the appellate court will ordinarily only reverse if the error of law has been properly called to the district court's attention and a ruling on that error has been obtained. The Court of Appeals will decide the case based on the record made in the trial court; you cannot present new evidence to the Court of Appeals.

7. If you have any questions, the clerks of the court may be able to help you. However, while the clerks can answer procedural questions and may be able to direct you to appropriate rules, the clerks cannot give legal advice.

8. Pro se litigants are held to the same standard of compliance with court rules and procedures as attorneys. Newsome v. Farer, 103 N.M. 415, 419, 708 P.2d 327, 331 (1985).

9. Be courteous. You can catch more flies with honey than with vinegar.

II.

DESCRIPTION OF STEPS FOR AN APPEAL

1. Notice of Appeal:

The first thing that you need to do to appeal is file a notice of appeal. The notice of appeal usually must be filed within 30 days of the decision you are appealing from, and the decision you are appealing from must be a written, final judgment. The date of the decision is usually the date the decision is filed, not the date you receive it. The notice of appeal is usually filed in the district court if you are appealing from district court and in the Court of Appeals if you are appealing from certain administrative agencies. Appeals from many administrative agencies are not heard by the Court of Appeals, but instead by the district courts. This pamphlet does **not** cover them. As to them, see Rules 1-074 and 1-075 NMRA and NMSA 1978, § 39-1-1.1. If you have to file the notice of appeal in the Court of Appeals, you must pay the docket fee of \$125 at that time unless the appeal is free process. [See paragraph 2 for more on free process.] You must consult the statute or rule dealing with the particular type of appeal you are taking to find out for sure where the notice of appeal is supposed to be filed and how long you have to file it. Filing the notice of appeal is very important. If you do not file it in the right place or at the right time, your appeal probably will be dismissed. A sample notice of appeal is on page 20. The notice of appeal, if the appeal is from district court, must contain the items listed in Rule 12-201 NMRA and must be served in the way described in that rule.

2. Docketing Statement:

The next thing that you need to do is file a docketing statement with the Court of Appeals and the district court and serve it as you did with the notice of appeal. You must also either pay the docket fee of \$125 or move for free process unless you have already done so. If you are entitled to free process, you may attach the district court free process order to your docketing statement. If the district court has not ordered free process, you may apply to the Court of Appeals for free process.

The requirements of a docketing statement are set out in Rule 12-208 NMRA. A sample docketing statement is on page 23. Do not copy it, but use it as a guide for preparing your own docketing statement. The docketing statement is supposed to be a short document telling the Court of Appeals the three basic things it needs to know

about your appeal: a. what the facts of the case are; b. what the legal issues are and how they were raised and ruled on in the trial court; and c. what the legal authorities supporting your issues are. As far as the facts are concerned, you must recite in your docketing statement all of the facts relating to the issues you raise, including those that favor the other side. For example, if you think that a witness has lied, you must still tell the Court about that witness's testimony if it is related to the issues you raise.

3. Calendar:

Shortly after the Court of Appeals receives your docketing statement, it will receive the record proper that you must pay for unless you have free process. Then the Court will calendar the case. The calendars are found in Rule 12-210 NMRA.

a. Summary calendar:

If your case is assigned to a summary calendar, you have 20 days from service of the notice of proposed disposition or calendar notice (23 days from the date stamped on it if it was mailed to you) to file a memorandum in opposition, telling the Court why the disposition proposed in the notice should or should not be made. No oral argument is allowed. If you have taken the appeal and the Court proposes summary affirmance, you need to tell the Court why it should not summarily affirm. If you want to amend the docketing statement to add new issues, you must follow the steps outlined in the case of State v. Moore, 109 N.M. 119, 128-30, 782 P.2d 91, 100-01 (Ct. App. 1989), to do so. You need not amend the docketing statement to add new facts or authorities. You may simply argue the new facts and authorities in your memorandum. After you file your memorandum, the Court may again assign the case to a summary calendar, and the process starts again. The Court may also decide the case at this point. [See Paragraph 4 below.] Finally, the Court might assign the case to a nonsummary calendar as described in paragraph 3b.

b. Nonsummary Calendar:

Your case may also be assigned to a legal calendar, a general calendar, or to the Court's expedited bench decision program.

(1) General Calendar:

If your case is assigned to the general calendar, you will need to order from the court reporter and district court the transcript and exhibits that will be needed for appeal. You do this in the manner set forth in Rule 12-211 NMRA and Rule 12-212 NMRA. Sample requests for transcript and exhibits are on pages 34-35 and 36-37. If the transcript is an audio recording, the clerk of the district court will automatically send the tapes or discs to the appellate court. You are responsible for paying for the transcript (unless free process has been granted) and making sure that the transcript is filed on time and that it is accurate and complete. Your brief will be due 45 days from the date of the filing of the transcript in the Court of Appeals. The Court will send you a notice when the transcript is filed, but you should know when it is filed since you are responsible for making sure that it is filed on time. The answer brief is due 45 days after service of the brief in chief, and the reply brief is due 20 days after service of the answer brief. Briefs must follow the outline of Rule 12-213 NMRA. A sample brief in chief, answer brief, and reply brief are on pages 40-60.

(2) Legal Calendar:

If your case is assigned to the legal calendar, there will be no transcript of proceedings and your brief will be due 20 days from the date of the calendar notice. Answer briefs on a legal calendar are due 20 days from service of the brief in chief. Reply briefs are due 20 days from service of the answer brief.

(3) Oral Argument on General or Legal Calendar:

If your case is assigned to a general or legal calendar, you will not know if you will get to argue your case in front of the judges until later on. The Court will send you a notice with an oral argument calendar if it wants to hear argument in the case. The Court very rarely hears oral argument. After most oral arguments, the Court will "take the case under advisement," which means that it will not decide the case until it has written an opinion, which usually takes about five months, but could take as little as one week or as much as a year or two.

(4) Expedited Bench Decision Program:

If your case is assigned to the expedited bench decision program, the assignment will generally be together with a general calendar assignment. Therefore, you will order and obtain the

transcript, just like on a general calendar. However, the order will recommend or require that you file a shorter brief (20 pages or less) in a shorter time (20 days or less), and it will say that the case will be set for oral argument on the expedited bench decision program. What this means is that the Court will try to decide the case right there from the bench after the oral argument. The Court will usually take a brief recess and then come back out on the bench with its decision, which will be followed by a written decision either that day or the next day.

4. Decision, Rehearing, Certiorari:

The Court will decide the case in a written opinion, which may be a formal, published opinion or a memorandum, unpublished opinion or a decision on the expedited bench decision program. If you are unhappy about the way the case came out, you may move for rehearing or ask a higher court (the New Mexico Supreme Court) to review the case. However, you should do this only if your case meets the criteria for moving for rehearing or asking for higher court review (known as petitioning for certiorari). The criteria for rehearing are contained in Rule 12-404 NMRA, and you have 15 days from the date of the opinion to move for rehearing. You should move for rehearing only if the Court overlooked or misapprehended one of your arguments. If you simply disagree with the way the Court has decided your case, that is not grounds for rehearing. The criteria for certiorari are contained in Rule 12-502 NMRA, and you have 20 days from the date of the opinion or the first denial of rehearing to petition for certiorari. Again, you should petition for certiorari only if the criteria are met, and not simply because you think that the Court of Appeals is wrong.

5. Motions:

If you need some type of relief that is out of the ordinary, the way you ask for it is by filing a motion. Motions are provided for in Rule 12-309 NMRA. Be sure to file your motion as early as you can, include all of your reasons for requesting the particular relief in it, and do not bother providing the Court with a form of order. The Court will handwrite its order on the bottom of your motion and send a photocopy back to you as the order. A sample motion for extension of time to file a brief is on pages 38-39.

6. Other Important Rules:

Important rules that you should be aware of, in addition to the ones referred to above, are 12-305 on form of papers, 12-306 on

numbers of copies, 12-307 on filing and service, and 12-308 on computation of time. In addition, Rule 12-312 NMRA allows the Court to take various action, including dismissing the appeal and refusing to hear the offending party's contentions, for violating the Rules of Appellate Procedure.

CHECKLIST FOR PROCESSING CASES
IN THE NEW MEXICO COURT OF APPEALS

The following checklist contains a list of significant steps and time factors for processing an appeal and some other proceedings; the checklist is not intended to be exhaustive. All parties to the appeal are required to comply with all applicable rules and statutory provisions relating to their specific appeal. See generally the Rules of Appellate Procedure. Rules 12-101 to 12-608 NMRA.

I. FILING AN APPEAL

A. When

1. Final Judgments - Rules 12-201 and 12-601 NMRA.

If the appeal is to the N.M. Supreme Court or Court of Appeals, the notice of appeal must be filed 30 days after the filing of the judgment or order appealed from. The filing of a post-trial motion pursuant to NMSA 1978, Section 39-1-1, Rules 1-050(B), 1-052(B)(2), or 1-059, or a motion pursuant to Rule 5-614, based on grounds other than newly discovered evidence, extends the time limits for filing a notice of appeal. An extension of time may be granted by the district court, but only upon a showing of certain circumstances. If it is an administrative appeal in which the notice of appeal is required to be filed in the appellate court, an extension of time may be granted by the appellate court.

2. Interlocutory Orders - Rule 12-203 NMRA.

An application for appeal from an interlocutory order containing the statement prescribed by NMSA 1978, Section 39-3-3A(3) or Section 39-3-4A must be filed within 15 days after entry of the order in the district court. Extensions will not be granted by the appellate court. Candelaria v. Middle Rio Grande Conservancy Dist., 107 N.M. 579, 581, 761 P.2d 457, 465 (Ct. App. 1988).

3. Writs of Certiorari - Rule 12-505 NMRA.

Review may be obtained in the appellate court of a District Court decision (1) from administrative appeals pursuant to Rule 1-074 NMRA and NMSA 1978, Section 39-3-1.1; and (2) from constitutional reviews of decisions and orders of administrative agencies pursuant to Rule 1-075 NMRA. The petition for writ of certiorari shall be filed with the Court of Appeals within 20 days after entry of the final action by the District Court.

B. Court having jurisdiction - Rule 12-102 NMRA.

1. Supreme Court

- a. death penalty or life imprisonment imposed;
- b. appeals from Public Regulation Commission;
- c. appeals from grants of habeas corpus; and
- d. Others as reserved by Constitution or Supreme Court order or rule.

2. Court of Appeals

All other appeals.

II. PROCESSING THE APPEAL

A. File the notice of appeal- See Rules 12-202 and 12-601 NMRA.

- 1. with the district court clerk if the appeal is from the district court;

2. with the APPELLATE COURT if the appeal is from an administrative agency, and is not an appeal included in Rules 1-074 and 1-075 NMRA; and NMSA 1978, Section 39-3-1.1.
- B. Serve copies of notice of appeal: See Rule 12-202 NMRA. (To serve a paper means to mail it or deliver it to the person to be served.)
1. In criminal, criminal contempt, and cases governed by the Children's Court Rules: on the appellate court, appellate attorney general, appellate public defender, trial judge, trial counsel for the other parties, and the tape monitor or court reporter.
 2. In child abuse and neglect proceedings and proceedings involving the termination of parental rights, on those listed above and on the Legal Division of the Children, Youth and Families Department.
 3. In all other cases, on the appellate court, trial judge, tape monitor or court reporter, and trial counsel for the other parties.
 4. In Workers' Compensation Administration cases, also serve a copy on the Administration.
 5. If a party is not represented by counsel, service shall be made by mailing a copy of the notice of appeal to the party's last known address.
- C. Docket the Appeal - Rule 12-208 NMRA.
1. Within 30 days of filing notice of appeal, file the docketing statement with APPELLATE COURT CLERK.
 2. Pay the docket fee (\$125) or present a copy of an order of the district court allowing free process, or file an application for free process with Court of Appeals.
 3. Serve copy of docketing statement on district court clerk or Workers' Compensation Administration Clerk and on those required to be served with a notice of appeal.
- D. The Record Proper - Rule 12-209 NMRA.
- Pay the district court clerk for the costs of preparing the record proper (the court file) within 10 days of

filing the docketing statement. The district court clerk prepares and files the record proper with the appellate court upon receipt of the docketing statement and sends a copy of the district court docket sheet to all counsel of record.

E. Appellate Calendar Assignment - Rule 12-210 NMRA.

1. The Court of Appeals assigns all cases to one of three calendars. A calendar notice will be mailed the same day it is filed.
2. If the case is placed on a summary calendar, a memorandum in opposition to or in support of proposed disposition and calendar assignment may be filed 20 days after the date of service of the calendar assignment.

F. Transcript of Proceedings - Rule 12-211 NMRA.

If the appeal is assigned to a general calendar, the transcript must be prepared and filed.

1. Audio Transcripts

- a. file proof of satisfactory arrangements for payment of cost in the district court within 5 days of service of the calendar notice;
- b. within 15 days of receipt of calendar assignment, district court clerk sends original and two copies of the tape(s) or disc(s) to appellate court.

2. Stenographic Transcript

- a. within 15 days of service of calendar assignment, the appellant shall file in the district court and serve designation of proceedings;
- b. 15 more days for other parties to designate additional portions of the transcript of proceedings;
- c. each party shall file proof of satisfactory

arrangements with the district court within 15 days of designation;

d. within 15 days after service of notice of filing of transcript by the district court clerk, file any objections with the district court; the district court shall hold a hearing on any objections with 15 days after filing of objections.

e. The district court clerk sends the original and two copies of the transcript to the appellate court when time for filing objections expires or, if there are any objections, after they are ruled on by the district court.

3. The Court of Appeals will send notice to the parties when the audio recordings or transcript are filed in the appellate court. The filing of the recordings or transcript starts the briefing time.

G. Exhibits and Depositions - Rule 12-212 NMRA.

If the appeal is assigned to a general calendar, file a designation of documentary exhibits and depositions in the district court within 15 days of the calendar notice; appellee has 15 days to designate further exhibits. The district court clerk sends the original of the designated exhibits and depositions to appellate court.

Non-documentary exhibits may be designated only with the permission of the appellate court.

III. INTERLOCUTORY APPEALS - Rule 12-203 NMRA.

A. File original of application with appellate court. Extensions will not be granted by the appellate court. Send copies of application to all those required to be served with a notice of appeal and to the district court clerk or Workers' Compensation Administration Clerk.

B. If application is granted, court will make a calendar assignment and district court clerk will send copy of record proper. If the application is granted, the district court proceedings are stayed unless otherwise ordered by appellate

court.

IV. WRITS OF CERTIORARI - Rule 12-505 NMRA.

1. File original petition with the appellate court. Send copies to the respondent and the clerk of the district court.
2. The petition shall not exceed 10 pages in length, and shall have attached a copy of the district court=s final order or judgment.
3. Rule 12-505(D) NMRA specifies the content of the cover page and the petition.
4. If the petition is granted, the court will make a calendar assignment and the district court clerk will send a copy of the record proper.

V. BRIEFS

A. Content - Rule 12-213 NMRA.

B. Filing - Rule 12-210 NMRA.

1. General Calendar

File brief in chief 45 days after transcript of proceedings is filed with the Court of Appeals;
File answer brief 45 days after service of BIC;
File reply brief 20 days after service of AB.

2. Legal Calendar

File brief in chief 30 days after calendar assignment;
File answer brief 30 days after service of BIC;
File reply brief 20 days after service of AB.

C. Copies - Rule 12-306(D) NMRA.

1. Brief in chief, answer brief, reply brief, request for oral argument: Original and five.
2. All other pleadings: Original only.
3. Serve copies of briefs (and all other pleadings) on

opposing counsel. Rule 12-307 NMRA.

VI. ORAL ARGUMENT - Rule 12-214 NMRA.

- A. A written request for oral argument must be made at or before the time for filing a reply brief or the time for filing a response to a motion.
- B. No oral argument allowed on Summary Calendar; for other calendars, oral argument is permitted in the discretion of the appellate court.

VII. FILING OF OPINIONS - Rule 12-310(D) NMRA.

- A. The same day the opinion is filed a paralegal from the court will phone the office of all counsel of record and inform the attorney or secretary of the fact the opinion has been filed. The paralegal makes a written record of the person to whom this information was conveyed.
- B. A copy of the opinion is mailed out the same day the opinion is filed unless the attorney indicates a desire to have it picked up from the clerk's office. Some paralegals may offer to e-mail an unsigned, unstamped copy of the opinion.

VIII. MOTION FOR REHEARING - Rule 12-404 NMRA.

- A. A motion for rehearing may be filed within 15 days after the filing of the appellate court's disposition.
- B. The 3-day mailing period contained in Rule 12-308 does not apply.
- C. A motion for rehearing which is not acted upon within 30 days after it is filed shall be deemed denied unless otherwise ordered by the Court.

IX. CERTIORARI TO THE COURT OF APPEALS - See Rule 12-502 NMRA.

- A. A petition for writ of certiorari may be filed with the Supreme Court within 20 days after final action by the Court of Appeals. A calendar notice is NOT a final action.
- B. The 3-day mailing period does not apply.

X. ISSUANCE OF MANDATE - Rule 12-402 NMRA.

- A. Mandate shall not issue until the time has elapsed for seeking certiorari in the Supreme Court, and if sought, shall not issue until final disposition by the Supreme

Court.

- B. Upon showing of good cause, an appellate court may recall a previously issued mandate within 10 days after its issuance.

Revised 10/01/05
Cheklist.v5

PRACTICAL POINTERS FOR PROCESSING CASES IN THE COURT OF APPEALS

Mailing Address: New Mexico Court of Appeals

Patricia C. Rivera Wallace, Clerk
P.O. Box 2008
Santa Fe, N.M. 87504

Street Address: 237 Don Gaspar

Telephone Number: 505-827-4925

Fax Number: 505-827-4946 (The Court will only accept pleadings by fax if only one copy is required, and if no money is required!)

Albuquerque Office: 1117 Stanford NE
Albuquerque, NM 87106
505-841-4618
505-841-4614 (Fax)

Internet Address <http://coa.nmcourts.com>

Filing Fee required:

1. \$125 or free process order
2. Filing fee is also required for cross-appeals
3. Any case filed without filing fee or free process order will NOT be docketed nor will motions for extension be acted on
4. Workers' compensation claimants are entitled to free process.

Costs for copies: YOU MUST PAY FOR THE COPIES BEFORE WE WILL MAKE THEM.

Photocopies	\$.25 per page
Microfilm copies	.25 per page
Each certificate	1.00

Number of copies of papers Rule 12-306 NMRA:

Briefs in chief:	original plus 5 copies (total 6)
Answer Brief:	original plus 5 copies (total 6)
Reply Brief:	original plus 5 copies (total 6)
Request for Oral Argument:	original plus 5 copies (total 6)
All other pleadings:	original only

Briefs may not be filed by fax.

If you want an endorsed copy returned to you, send the copy and a self-addressed, stamped envelope.

Caption in Children's Court, delinquency, Families in Need of Supervision, Abuse/Neglect, or Termination of Parental Rights cases, use the following:

STATE OF NEW MEXICO,
Plaintiff-Appellee
v.

Larry K.,
Child-Appellant.

OR

STATE OF NEW MEXICO, ex rel.,
CHILDREN, YOUTH AND FAMILIES DEPARTMENT,
Petitioner-Appellee,
v.

MATTHEW K.,
Respondent-Appellant,
AND

In the Matter of AMANDA K., a Child.

Transcript of Proceedings:

When a case is placed on a general calendar, three copies of the audio recordings or transcript of proceedings must be filed in the Court of Appeals. You must NOT borrow the copy of the transcript from the district court clerk or court reporter before it is filed with the Court of Appeals. A copy may be checked out from us for use in preparing a brief and must be returned when the brief is filed. No motion is required to check out a copy of the audio recordings or transcript of proceedings. When the proceedings have been audio recorded, the entire proceedings, including pretrial, trial, and post-trial proceedings shall be filed with the Court of Appeals. Rule 12-211 NMRA)

Record Proper:

The record proper consists of all the papers filed in the district court or administrative agency. The entire record proper must be filed with the Court of Appeals. You may not designate portions of it (although you may file a motion with the Court of Appeals seeking to limit the record). Rule 12-309 NMRA. In addition,

any documents filed in district court during the pendency of the appeal shall be filed with the Court of Appeals as a Supplemental Record. The record proper may be checked out without a motion. It must be returned when the brief or other pleading is filed.

Motions:

1. Most motions are decided by the chief clerk or designee or motions judge without a motion hearing within 24 hours of filing. You are not required to attach a form order. A copy of the order will be mailed to you immediately by the Clerk's Office.
2. The Clerk or designee has authority to grant certain requests for extension.
3. All requests for extension must
 - (a) be made by written motion directed to the Clerk of the Court,
 - (b) contain specific grounds and show good cause for the extension (press of business is not an acceptable ground), and
 - (c) include the specific extension time you are requesting.
4. In most cases the time requested should not be in excess of two weeks. Motions requesting subsequent extensions on the same pleading will rarely be granted. Motions for extension filed on the day the pleading is due or later will not be favored and may be denied.
5. A written motion is required to check out the original set of audio recordings or an original transcript in a closed case.

Docketing statement: The Court requests that you attach an endorsed copy of the notice of appeal and judgment to your docketing statement. Trial counsel is responsible for preparing and filing the docketing statement.

Briefing schedules: The briefing schedule starts to run when the main portion of the transcript is filed with the Court of Appeals. If a

small portion of the transcript is filed later and you need an extension, file an extension request (see Motions). In Bernalillo County cases, the CAT transcript is presumed to be the main portion of the transcript.

Change of Address Notices: Include the Court of Appeals case numbers for all your cases that are pending in the Court.

Requests for closed cases: If the case file is on CD-ROM or microfilm, it may take at least a week for the Court to retrieve it.

Include the Court of Appeals number on all pleadings and correspondence. Have the Court of Appeals number ready when you call us.

Opinions: When the opinion is filed in your appeal, a judge's paralegal will telephone you immediately. Then, one copy of the opinion will be sent to each attorney of record without charge. Opinions are ordinarily filed only from 8:00 to 12:00 a.m., except in expedited bench decision cases.

Proof of Service: All pleadings should contain a proof of service showing who was served, the addresses of the people served, how, and when. If you are not an attorney, you must make an affidavit of service. Only attorneys may make certificates of service.

Sign your pleadings.

pracpoin.mem 10/01/05

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TOBY ROYBAL,

Plaintiff-Appellant,

v.

Ct. App. No. 20,381

TONY ROYBAL,

Defendant-Appellee.

DOCKETING STATEMENT

Civil Appeal from the First Judicial District Court
County of Santa Fe
The Honorable Art Encinias

William J. Waggoner
529 W. San Francisco St.
Santa Fe, NM 87501
(505) 983-3272
Trial Counsel

Jane Bloom Yohalem
P.O. Box 2827
Santa Fe, New Mexico 87504
(505) 988-2826
Appellate Counsel

Attorneys for Plaintiff-Appellant

COMES NOW Toby Roybal, Plaintiff-Appellant in the above-captioned matter, and submits this *Docketing Statement*.

NATURE OF THE PROCEEDING

This is an action for breach of an oral contract providing for the transfer of real property from the Defendant, Tonita Roybal, to the Plaintiff Toby Roybal in return for renovation of a house located at 703 Alto Street in Santa Fe. This case is on appeal from the trial court's *Order of Dismissal* granting Defendant's motion to dismiss based on the statute of frauds. The statute of frauds is an affirmative defense which was not raised until after the conclusion of the Plaintiff's case at trial, four years after the filing of this action.

DATE OF JUDGMENT

The *Order of Dismissal* in this matter was entered on March 10, 1999. This appeal was timely filed on April 8, 1999.

STATEMENT OF THE CASE

This breach of contract action was filed in magistrate court in December, 1993. Judgment was entered by the magistrate court on July 8, 1994. Plaintiff Roybal timely sought *de novo* review of the unfavorable judgment of the magistrate court by filing a notice of appeal in the district court on July 21, 1994. Because this case was commenced with a notice of appeal, the parties initially relied on the complaint and answer filed in magistrate court.

In January 1996, Defendant moved to amend her answer to state a counterclaim for damage to her property allegedly caused by the Defendant. The amended answer, filed with permission of the court on February 15, 1996, did not raise a statute of frauds defense.

On April 1, 1996, the Plaintiff responded to interrogatories posed by the Defendant. On April 2, 1996, Defendant filed a *Motion for a More Definite Statement* as to Plaintiff's claims.

From the time the notice of appeal was filed until February 1997, Defendant first appeared *pro se* and was then represented by three different attorneys. Discovery and trial deadlines were postponed several times and the court several times entered and then withdrew orders of dismissal based on lack of activity. On March 26, 1997, the trial court found "as a result of several events beyond the parties' control, unavoidable confusion has plagued various procedural aspects of this case." The trial court then denied Defendant's request for a more definite statement, ordered that Plaintiff answer the Defendant's counterclaim and that a new scheduling order be put in place imposing new pleading, discovery, motion and trial timelines. This scheduling order was entered on March 4, 1997.

Plaintiff's *Answer to Defendant's Counterclaim*, filed March 25, 1997, clearly states that the contract alleged by Plaintiff is an oral contract.

On April 2, 1997, Defendant filed a *Motion to Dismiss for Failure to State a Claim and for Judgment on the Pleadings*, again complaining that the lack of specificity in Plaintiff's complaint made it difficult

for Defendant to answer Plaintiff's claims. Plaintiff argued in response on April 22, 1997, that Defendant had many opportunities to plead affirmative defenses throughout the pendency of the litigation, and had failed to do so.

On May 1, 1997, Defendant sought leave of the court to file a second amended answer to the complaint in this matter. While reiterating her claim that the Plaintiff's pleadings were not sufficiently specific, Defendant sought to file an amended answer raising 15 affirmative defenses based on the discovery and pleadings on file, including Plaintiff's responses to Defendant interrogatories and a pre-trial order filed with the court. The 15 affirmative defenses listed by the Defendant in her second amended answer did not include a statute of frauds defense to Plaintiff's claim that Defendant had breached an oral agreement between Plaintiff and Defendant to transfer real property at 703 Alto Street in Santa Fe to the Plaintiff.

On May 19, 1997, Defendant deposed Plaintiff Toby Roybal. The deposition focused on Plaintiff's allegation that Defendant Tonita Roybal had orally promised him the property at 703 Alta Street if he would renovate the two houses located there. Plaintiff clearly stated in his deposition that the contract at issue was an oral contract, not evidenced by any writing.

On May 1, 1998, Defendant filed a motion for summary judgment. Defendant's Exhibits 5, 6 and 8 to that motion are portions of Plaintiff's May 19, 1997 deposition which squarely state Plaintiff's

claim that there was a verbal contract between Plaintiff and Defendant and that one of the terms of that contract was a promise to transfer ownership of two houses at 703 Alto Street to the Plaintiff. Exhibit 8 to Defendant's summary judgment motion states in pertinent part as follows:

Q. And at the time that you were having this conversation with your mom, did she ever give you the impression that she wasn't going to do what she said? I mean, at the very beginning.

A. No. The only thing that she indicated first is that I can have that house. For the record, she said, "You can have this house and fix it up." She told me the same thing.

Exhibit 5 to Defendant's summary judgment motion states, in relevant part, as follows:

Q. When you started working on that home, were there any written agreements between you and Tony Roybal regarding the work that you were supposed to do there?

A. No.

Q. Were there any written agreements between you and Mrs. Roybal as to how she was to compensate you for working on that home?

A. No.

Q. Are there any written documents of any kind, a note or a letter or anything at all in writing?

A. Just verbally, sir.

Finally, Exhibit 6 to the Defendant's summary judgment motion includes the following question and answer:

Q. Before you started working on House No. 2, did you ever discuss the specifics about what you were going to do to the house and what she was going to give you in return?

A. Yes, there was an agreement that we talked about.

Although these deposition sections are attached as exhibits to Defendant's summary judgment motion, Defendant did not raise the affirmative defense of statute of frauds in her summary judgment motion. Nor did Defendant at any time between the May 19, 1997 deposition and the trial date more than a year later on July 9, 1998, plead or otherwise raise a statute of frauds defense.

On June 25, 1998, Plaintiff filed his response to Defendant's motion for summary judgment clearly stating in this response that the contract forming the basis of this action is a "verbal contract" to give Plaintiff the "Houses in question as consideration to Plaintiff if he renovated them." Response to Motion for Summary Judgment, p. 3.

On May 28, 1998, Plaintiff sought leave of the court to amend his complaint to leave the amount of damages open. Leave to amend was granted on June 22, 1998. Defendant did not take advantage of this amendment to the complaint to file an amended answer. Once again,

Defendant missed an opportunity to plead statute of frauds as an affirmative defense.

Plaintiff relied in proceeding to trial in this matter on Defendant's waiver of any statute of frauds defense. Plaintiff did not prepare any response to the statute of frauds defense. With notice, Plaintiff could have presented evidence responding to the Defendant's statute of frauds claim.

Trial in this matter was held on July 9, 1998. Plaintiff introduced evidence establishing the existence of an oral contract entered into between Plaintiff and Defendant to transfer the property at 703 Alta Street to Plaintiff at the conclusion of the renovation work. After the presentation of the Plaintiff's case, the Defendant moved for a directed verdict on other grounds. The trial court, *sua sponte*, suggested that an oral contract for the transfer of real property violated the statute of frauds. Plaintiff objected, arguing that it was too late for the Defendant to raise the affirmative defense of statute of frauds. The court rejected this argument and granted what the court construed as Defendant's motion to dismiss based on the statute of frauds. *Order of Dismissal*, filed March 10, 1999.

ISSUE PRESENTED

1. Where Defendant had been on notice throughout the pendency of this action that Plaintiff claimed a right to real property pursuant to an oral agreement, whether the Defendant waived the

affirmative defense of statute of frauds by failing to raise it until the defense was suggested by the court, *sua sponte*, at the conclusion of the Plaintiff's case at trial.

PRESERVATION OF ISSUE

This issue was preserved for appeal by the objection of counsel for the Plaintiff to the granting of the motion to dismiss on the grounds that the statute of frauds is an affirmative defense which had not been timely raised by the Defendant.

STANDARD OF REVIEW

***Martinez v. Martinez*, 93 N.M. 673, 676, 604 P.2d 366, 369 (1979).**

The appellate court is not bound by the trial court's conclusions of law and will address the legal issues to determine if the trial judge applied correct principles of law.

AUTHORITIES

1. **Rule 1-008(C) NMRA.** Statute of frauds is an affirmative defense which must be pleaded in a responsive pleading. *See also, Kestenbaum v. Pennzoil Company*, 108 N.M. 20, 24, 766 P.2d 280, 284 (1988).

2. ***Gonzales v. Surgidev Corp.*, 120 N.M. 133, 140, 899 P.2d 576, 583 (1995).** An affirmative defense ordinarily refers to a state of facts provable by defendant that will bar plaintiff's recovery once a right to recover is established.

3. ***Fredenburgh v. Allied Van Lines, Inc.*, 79 N.M. 593, 446 P.2d**

868 (1968). Matters constituting an affirmative defense must be pleaded. If an affirmative defense is not pleaded or otherwise properly raised, it is waived. Raising an affirmative defense for the first time in requested findings submitted to the court is too late to serve the purpose of Rule 1-008 in providing notice of defenses to the plaintiff.

4. ***Groff v. Circle K. Corporation*, 86 N.M. 531, 525 P.2d 891 (Ct. App. 1974).** Where an affirmative defense is not pleaded, raised by an affirmative pleading, or tried by express or implied consent, the defense is waived.

5. ***Bronstein v. Biava*, 114 N.M. 352, 353, 838 P.2d 968, 969 (1992).** "It is well established that if an affirmative defense is not pleaded or otherwise properly raised, it is waived."

6. ***Arch, Ltd. v. Yu*, 108 N.M. 67, 70, 766 P.2d 911, 914 (1988).** Failure to plead an affirmative defense waives that defense unless it is raised at trial, litigated without objection, and ruled on by the trial court.

7. ***Bellet v. Grynberg*, 114 N.M. 690, 845 P.2d 784 (1992).** It is an abuse of discretion to permit amendment of the pleadings to conform to the evidence pursuant to Rule 1-015(B) NMRA, when the evidence relied on to support implied consent is also relevant to a pleaded issue. "Implied consent to a theory is not indicated when unobjected-to-evidence is relevant to other pleaded theories." It is

an abuse of discretion to grant such an amendment to the pleadings where the opposing party is prejudiced by the lack of earlier notice.

8. ***United Nuclear Corp. v. General Atomic Co.***, 93 N.M. 105, 597 P.2d 290 (1979). Preparation for trial by a party based on the belief that the other party does not intend to raise the affirmative defense of a right to arbitration constitutes substantial prejudice.

PROCEEDINGS

The proceedings in this matter were tape recorded. The trial was held on July 9, 1998.

RELATED OR PRIOR APPEALS

None.

Respectfully submitted,

William Waggoner
529 W. San Francisco St.
Santa Fe, NM 87501
(505) 983-3272
Trial Counsel for Plaintiff-Appellant

Jane Bloom Yohalem
P.O. Box 2827
Santa Fe, N.M. 87504
(505) 988-2826
Appellate Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that foregoing was mailed, first-class mail, postage prepaid, to Martin Martinez, P.O. Box 760, Espanola, New Mexico 87532, Clerk of the First Judicial District Court, P.O. Box 2268, Santa Fe, N.M. 87504; Judge Art Encinias, P.O. Box 2268, Santa Fe, N.M. 87504 and to the Court Monitor, Division V, P.O. 2268, Santa Fe, N.M. 87504, on this, the 28th day of May, 1999.

Jane Bloom Yohalem

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. CV-90-054E

MARY BETH LOPEZ,

Petitioner,

v.

JOHN LOPEZ,

Respondent.

DESIGNATION OF TRANSCRIPT

Pursuant to Rule 12-211(C)(1) NMRA, Respondent designates the following portions of the proceedings to be included in the transcript of proceedings on appeal:

Opening statements, closing arguments, the testimony of all witnesses, and argument on all motions and objections in the trial of the above case that was held on April 26, 1997.

Respectfully submitted,

John Lopez, pro se
237 Don Gaspar
Santa Fe, NM 87501
(505) 988-8888

Upon my oath, I swear
that I served a copy of the
foregoing motion on Rose Roe,
attorney for Respondent-Appellee, P.O. Box
2000, Santa Fe, NM 87504 by mailing it to
her with sufficient first-class postage
affixed thereto on May 25, 1997.

John Lopez

Subscribed and sworn to before me on this 25th day of May, 1997.

NOTARY PUBLIC

My commission expires:

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. CV-90-054E

MARY BETH LOPEZ,

Petitioner,

v.

JOHN LOPEZ,

Respondent.

DESIGNATION OF EXHIBITS

Pursuant to Rule 12-212(A) NMRA, Respondent designates the following exhibits to be transmitted to the Court of Appeals for use on appeal:

Respondent's Exhibit 1

Respondent's Exhibit 2

Respectfully submitted,

John Lopez, pro se
237 Don Gaspar
Santa Fe, NM 87501
(505) 988-8888

Upon my oath, I swear
that I served a copy of the
foregoing motion on Rose Roe,
attorney for Respondent-Appellee, P.O. Box
2000, Santa Fe, NM 87504 by mailing it to
her with sufficient first-class postage
affixed thereto on May 25, 1997.

John Lopez

Subscribed and sworn to before me on this 25th day of May, 1997.

NOTARY PUBLIC

My commission expires:

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARY BETH LOPEZ,

Petitioner-Appellee,

v.

No. 17,999

JOHN LOPEZ,

Respondent-Appellant.

MOTION FOR EXTENSION OF TIME TO FILE BRIEF IN CHIEF

Pursuant to Rule 12-309 NMRA, undersigned who is appearing pro se requests an extension of time of fourteen days in which to file his brief in chief. As grounds therefore, it is stated:

1. The transcript of proceedings was filed on July 8, 1997, making the due date for the brief in chief August 22, 1997.

2. This is the first brief I have ever filed in an appellate court, and I want to be sure that I am complying with the rules and that the brief is thoroughly researched and accurate.

3. I have a full-time job and consequently have to work on the brief on nights and weekends only.

4. I have long-standing vacation plans to spend the first two weeks in August with my children traveling to some of the National Parks in New Mexico.

5. I have contacted opposing counsel, and she has no objection to the granting of this motion.

WHEREFORE undersigned requests an extension of time until September 5, 1997, in which to file his brief in chief.

Respectfully submitted,

John Lopez, pro se
237 Don Gaspar
Santa Fe, NM 87501
(505) 988-8888

Upon my oath, I swear
that I served a copy of the
foregoing motion on Rose Roe,
attorney for Respondent-Appellee, P.O. Box
2000, Santa Fe, NM 87504 by mailing it to
her with sufficient first-class postage
affixed thereto on July 25, 1997.

John Lopez

Subscribed and sworn to before me on this 25th day of July, 1997.

NOTARY PUBLIC

My commission expires:

.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARY BETH LOPEZ,

Petitioner-Appellee,

v.

No. 17,999

JOHN LOPEZ,

Respondent-Appellant.

APPELLANT'S BRIEF IN CHIEF

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
ART ENCINIAS, District Judge

Jane Garcia
237 Don Gaspar
Santa Fe, NM 87501
(505) 988-8888

Attorney for Respondent-Appellant

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SUMMARY OF PROCEEDINGS

John Lopez (Father) appeals from the decision of the district court, which increased the child support he was ordered to pay to Mary Beth Lopez (Mother) on behalf of his three children. [R.P. 75 - notice of appeal; R.P. 73 - order increasing child support]

A final order of divorce was entered in 1990, which awarded joint custody of the parties' three children, with primary physical custody given to Mother. [R.P. 50-53; Exhibit 1] Father was ordered to pay \$1500 per month in child support in that 1990 order, which was the amount to which the parties had stipulated. [R.P. 52; see also R.P. 35 - stipulation; Exhibit 2] In 1990, Father was a lawyer and was earning approximately \$70,000 per year. [Tr. 5/10-11] In 1991, Father was involved in a large anti-trust case, and his firm recovered a large judgment for his many clients. [Tr. 5/30-32] The \$1.5 million dollar attorney fee was divided by the firm so that Father received \$900,000 of the fee. [Tr. 5/33-34] Father decided that he was burned out as a lawyer and retired immediately. [Tr. 5/36]

In 1994, Mother filed a motion to increase the child support Father was paying. [R.P. 60-61] Mother asked for \$2000 per month retroactive to 1991 when Father received his large fee. [Id.] Father argued that he was retired and the \$900,000 would have to last him the rest of his life. [Tr. 6/3-6] At \$50,000 per year, that would be only 18 years. [Id.] Therefore, the court should not increase the child support. [Id.] Father also argued that the court could not order child support to be increased retroactively to a time before the date on which Mother filed her motion. [Tr. 6/6-10] Father filed

requested findings of fact and conclusions of law in accordance with these arguments. [R.P. 65-67]

The trial court ruled that the size of the fee award justified retroactively modifying the child support back to 1991 and that support would be increased to \$2000 per month based on the fact that Father could still work as a lawyer, plus he had the large fee from the antitrust case that, in fairness, should be shared by his children. [Tr. 6/10-13] The trial court awarded Mother judgment of \$24,000 (\$500 per month from April 1991 when Father received his fee until April 1997) and entered an order requiring Father to pay \$2000 per month until further court order. [R.P. 73-74]

POINT I: THE TRIAL COURT ERRED IN ORDERING THAT THE INCREASE IN CHILD SUPPORT WOULD TAKE EFFECT TWO YEARS PRIOR TO THE DATE THAT MOTHER FILED HER MOTION TO INCREASE.

The applicable date for modification of child support payments is the date of filing the pleading asking for such modification. Montoya v. Montoya, 95 N.M. 189, 190, 619 P.2d 1233, 1234 (1980). In this case, Mother filed her motion seeking modification in 1994. [R.P. 60] Accordingly, the trial court erred in entering an order which retroactively increased the child support payments for two years prior to the filing of Mother's motion.

POINT II: THE TRIAL COURT ERRED IN SETTING CHILD SUPPORT IN AN AMOUNT THAT IS \$1900 PER MONTH OVER THE AMOUNT PERMITTED BY NEW MEXICO'S CHILD SUPPORT GUIDELINES.

Prior to the adoption of child support guidelines in New Mexico, the setting of child support was discretionary with the trial court. Perkins v. Rowson, 110 N.M. 671, 674-75, 798 P.2d 1057, 1060-61 (Ct. App. 1990). However, the purpose of the guidelines is to make the setting of child support less discretionary, both for ease of administration and to make awards more equitable by ensuring consistent treatment of people in similar circumstances. Id. at 675, 798 P.2d at 1061; see also NMSA 1978, § 40-4-11.1(B) (1991). Therefore, the standard of review for this issue is as for a legal question: did the trial court follow the statute? See Perkins, 110 N.M. at 674-75, 798 P.2d at 1060-61. Clearly, the trial court here did not do so, and its judgment should be reversed.

The evidence was undisputed that Father quit his job as a lawyer and was unemployed at the time of the hearing on Mother's motion. [Tr. 5/36] Moreover, there was no evidence of what interest, if any, Father was earning on the money he had earned as his legal fees and no evidence of any savings that he had. [Tr. 5/40] For all we know, Father keeps the money stuffed in his mattress.

According to the child support guidelines, the trial court should set a minimum amount of support for someone not making any money, and that amount is \$85 per month for three children. Section 40-4-11.1(J). The amount of \$2000 per month should not be awarded until the earnings are well over \$8000 per month. Id. Because the trial

court is required to follow the guidelines and did not, its order should be reversed and remanded with instructions to award Mother only \$85 in child support.

CONCLUSION

For the reasons set forth in Point I, the trial court's order awarding Mother \$24,000 in back child support should be reversed. For the reasons set forth in Point II, the trial court's order increasing child support to \$2000 should be reversed.

Respectfully submitted,

Jane Garcia
237 Don Gaspar
Santa Fe, NM 87501
505) 988-8888

Attorney for Respondent-Appellant

Certificate of Service

I hereby certify that I served a copy of the foregoing brief in chief on Rose Roe, attorney for Petitioner-Appellee, P.O. Box 2000, Santa Fe, NM 87504 by mailing it to her with sufficient first-class postage affixed thereto on August 28th, 1997.

Jane Garcia

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARY BETH LOPEZ,

Petitioner-Appellee,

v.

No. 17,999

JOHN LOPEZ,

Respondent-Appellant.

APPELLEE'S ANSWER BRIEF

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
ART ENCINIAS, District Judge

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Statutes:

NMSA 1978, § 40-4-11.1 (1991) 3
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POINT I: A COURT HAS DISCRETION IN DETERMINING WHEN TO MAKE A MODIFICATION IN CHILD SUPPORT EFFECTIVE, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION HERE IN LIGHT OF FATHER'S AMPLE RESOURCES.

The general rule is that the award of child support is a matter within the discretion of the trial court. Spingola v. Spingola, 91 N.M. 737, 742, 580 P.2d 958, 963 (1978). Although Montoya v. Montoya, 95 N.M. 189, 190, 619 P.2d 1233, 1234 (1980), states the usual rule that the date of filing the motion is the applicable date for modification, the Court of Appeals has given the trial courts discretion to depart from the usual rule in appropriate circumstances. See Roberts v. Wright, 117 N.M. 294, 300, 871 P.2d 390, 396 (Ct. App. 1994). Whether the circumstances here are appropriate is within the trial court's discretion. See id. In order to prevail on appeal, therefore, Father must show an abuse of discretion. An abuse of discretion is an action clearly contrary to the logic and effect of the circumstances before the court. Rhinehart v. Nowlin, 111 N.M. 319, 330, 805 P.2d 88, 99 (Ct. App. 1990).

In this case, Father cannot show that the trial court's decision was clearly against logic. In child support matters, it is not simply the rights of the mother and the father that are involved; the rights of the children are also involved, and their rights should be paramount in the court's mind. See McCurry v. McCurry, 117 N.M. 564, 566-68, 874 P.2d 25, 27-29 (Ct. App. 1994).

When Father received almost a million dollars from his law firm, his potential standard of living changed radically. [Tr. 5/30-43] In fairness, therefore, his children should share in that potential

change. The fact that Mother did not file her motion for several years should not prejudice the children, who are innocent of any delay or wrongdoing in this regard. See id. It was entirely fair and reasonable, and accordingly not an abuse of discretion or against logic, to require Father to equitably support his children, to the extent of his ability, during all the time that he was able to do so. The award of \$24,000 should be affirmed.

POINT II: THE TRIAL COURT WAS ENTITLED TO
CONSIDER FATHER'S INTENTIONAL UNEMPLOYMENT AS
WELL AS HIS VAST RESOURCES IN ASSESSING THE
PROPER AMOUNT OF CHILD SUPPORT TO AWARD.

Father generally agrees with Mother's brief that the child support guidelines are to make the setting of child support less discretionary and to provide equity and consistent treatment. [B.I.C. at 4] However, NMSA 1978, § 40-4-11.1(C)(1) (1991) expressly allows for the situation in which a party is intentionally unemployed or underemployed, and Section 40-4-11.1(A) permits deviation from the guideline amount as long as there is a statement of reasons for the deviation. In this case, the trial court made express findings that Father was intentionally unemployed, that he could easily be employed at an annual salary of \$70,000, that he was young and at the prime of his career, and that he had access to the majority of the large fee that he got. [R.P. 70-71] Thus, according to the statute, the trial court was not required to base the child support on Father's actual income, and its decision to consider his potential income as well as his fee in setting the child support at \$2000 for the benefit of the children should be affirmed.

CONCLUSION

For the foregoing reasons, the order of the trial court should be affirmed. In addition, Mother requests attorney fees for the services of her attorney on appeal. The trial court made an award of attorney fees below after finding economic disparity and that Mother needed the services of counsel to present her case. [R.P. 72] This Court should do the same.

Respectfully submitted,

Rose Roe
P.O. Box 2000
Santa Fe, NM 87504
(505) 988-9999

Attorney for Petitioner-Appellee

Certificate of Service

I hereby certify that I mailed a copy of the foregoing answer brief to Jane Garcia, attorney for Respondent-Appellant, 237 Don Gaspar, Santa Fe, NM 87504 with sufficient first-class postage affixed thereto on September 25, 1997.

Rose Roe

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARY BETH LOPEZ,

Petitioner-Appellee,

v.

No. 17,999

JOHN LOPEZ,

Respondent-Appellant.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
ART ENCINIAS, District Judge

Jane Garcia
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REPLY TO POINT I

This Court recently acknowledged that prior cases made it appear that there was some discretion in the trial court to make changes in child support effective on a date other than the filing of the petition. Gomez v. Gomez, 119 N.M. 755, 759, 895 P.2d 277, 281 (Ct. App. 1995). Nonetheless, this Court made it very clear that such discretion was to be exercised only in unusual circumstances. Id. The circumstances in this case are not that unusual. They are, basically, that Father's income increased. This is such a garden-variety circumstance that allowing it to qualify as the basis of a court's departure from the general rule would allow the exceptions to swallow the rule.

CONCLUSION

For these reasons and those stated in the brief in chief, the order of the trial court should be reversed.

Respectfully submitted,

Jane Garcia
237 Don Gaspar
Santa Fe, NM 87501
(505) 988-8888

Attorney for Respondent-Appellant

Certificate of Service

I hereby certify that I served a copy of the foregoing reply brief on Rose Roe, attorney for Petitioner-Appellee, P.O. Box 2000, Santa Fe, NM 87504 by mailing it to him with sufficient first-class postage affixed thereto on October 5, 1997.

Jane Garcia